No. 78-201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN B. GREENHOLTZ, CHAIRMAN OF THE NEBRASKA BOARD OF PAROLE, ET AL.,
Petitioners,

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AND THE PLAINTIFF CLASS IN *CHILDS* v. *UNITED STATES BOARD OF PAROLE*, 511 F.2d 1270 (D.C. Cir. 1974), AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

This case presents the questions whether and to what extent the Due Process Clause applies to proceedings to determine whether a prisoner should be released on parole. This case particularly concerns the Nebraska parole system. This Court's decision, however, will necessarily affect the constitutional rules governing the operation of all state and federal parole systems.

A. The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates student legal assistance programs for individuals who could not otherwise obtain legal services. LSO provides services for prisoners at the Federal Correctional Institution at Danbury, Connecticut, state prisoners in Connecticut's penal institutions, and mental patients at Connecticut Valley Hospital. Since its founding in 1970, LSO's Danbury Project has counselled over 3,000 inmates, making it one of the most extensive programs of legal assistance for federal prisoners in the country. Many of the cases involve representation of inmates before the United States Parole Commission. LSO's attorneys and law students have developed considerable expertise with the procedures mandated by the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*) and the Parole Commission's regulations promulgated under the new parole statute (28 C.F.R. §2.01 *et seq.*).[1]

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[1] LSO's representation of state and federal prisoners has resulted in extensive litigation to secure its clients' rights. Representative reported decisions include: *Drayton* v. *McCall*, No. 78-2030 (2d Cir. Oct. 2, 1978) *modifying* 445 F.Supp. 305 (D.Conn. 1978); *Ron* v. *Wilkinson*, 565 F.2d 1254 (2d Cir. 1977); *Holup* v. *Gates*, 544 F.2d 82 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); *United States* v. *Salerno (Silverman)*, 538 F.2d 1005, *clarified on denial of rehearing*, 542 F.2d 628 (3d Cir. 1976); *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975); *Grasso* v. *Norton*, 520 F.2d 27 (2d Cir. 1975); *Rhodes* v. *U.S. Parole Com'n*, 456 F.Supp. 17 (D.Conn. 1977); *Toomey* v. *Young*, 442 F.Supp. 387, 449 F.Supp. 336 (D.Conn. 1977), *appeal pending; Green* v. *Nelson*, 442 F.Supp. 1047 (D.Conn. 1977); *Dumschat* v. *Board of Pardons, State of Conn.*, 432 F.Supp. 1310 (D.Conn. 1977); *Moskowitz* v. *Wilkinson*, 432 F.Supp. 947 (D.Conn. 1977); *Williams* v. *United States Board of Parole*, 383 F.Supp. 402 (D.Conn. 1974); *Chesney* v. *Adams*, 377 F.Supp. 887 (D.Conn. 1974), *aff'd mem.*, 508 F.2d 836 (2d Cir. 1975); *Battle* v. *Norton*, 365 F.Supp. 925 (D.Conn. 1973). In addition, LSO has appeared as *amicus curiae* in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), and *United States* v. *Slutsky*, 514 F.2d 1222, 1226-30 (2d Cir. 1975).

In conjunction with the Daniel and Florence Guggenheim Foundation, LSO has sponsored two major academic projects concerning the parole system. During the 1974-75 academic year, the Yale Law School offered a Parole and Sentencing Workshop. Members of this Workshop authored a book evaluating the federal sentencing and parole system. *See* P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977). Many of the authors' proposals have been incorporated in the proposed revisions of the federal criminal code passed by the United States Senate. *See* S. 1437, Ch. 20 & 58, 95th Cong., 1st Sess. (1978). The other LSO academic project was the first major empirical and theoretical study of the reformed federal parole procedures and "guidelines" and the impact of these reforms on judges and the federal sentencing scheme. *See* W. Genego, P. Goldberger, and V. Jackson, *Project, Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975) (hereinafter "Project").

B. The Plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), comprises some 90 named federal prisoners representing all those eligible for parole consideration under Title 18 of the United States Code. The *Childs* litigation commenced in 1970 with the filing of a *pro se* complaint challenging the parole release procedures of the then United States Board of Parole as contrary to the Due Process Clause. The District Court appointed counsel from the undersigned firm of Williams & Connolly.

In 1973 the District Court held that the Parole Board must give reasons for parole denial and develop due process procedures for parole release decisions. *Childs* v. *United States Board of Parole*, 371 F.Supp. 1246 (D.D.C. 1974). The Court of Appeals affirmed the holdings that parole release proceedings implicate the Due Process

Clause and that reasons for denial of parole must be given. The Court of Appeals vacated and remanded for further consideration, in light of developments subsequent to the entry of the District Court's opinion, the portion of the order requiring that procedures be developed for prisoners' access to information which the Parole Board reviews in making its release decision. Remand proceedings on the access issue are still pending. In particular, this continuing litigation involves the extent to which the Parole Commission's regulations comply with the Parole Commission and Reorganization Act and the Due Process Clause.

The potential impact of the decision in this case is recognized in the *amicus curiae* briefs filed by the Solicitor General and by the Attorneys General of the States of Oklahoma and California. The *amici curiae* submitting this brief have broad experience with parole policies and practices throughout the country. The purpose of this *amici curiae* brief is to present additional information, based largely on experience of the *amici* in representing federal prisoners, that will provide the Court a more complete picture of the interests at stake.

Both parties have consented to the filing of this brief.

STATUTES INVOLVED

This case involves the Nebraska parole statutes. These provisions are set forth in the Brief for the Petitioners at 2-7. This case also has implications for the federal parole system. The pertinent provisions of the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*), and the regulations of the United States Parole Commission (28 C.F.R. § 2.01 *et seq.* (1977)) are reprinted in Appendix A of this Brief.

SUMMARY OF ARGUMENT

I.

The questions presented in this case—whether and to what extent the Due Process Clause applies to proceedings to determine whether a prisoner should be released on parole—affect the lives of almost 300,000 persons incarcerated in state and federal institutions. The impact of this decision will be felt in the cells of the nation's prisons in perhaps a more profound manner than any previous decision of this Court in the area of corrections. It is in this very realistic sense that prisoners are vitally concerned whether the Constitution extends to the deliberations of parole boards.

Prisoners have an interest in their eventual release on parole of sufficient magnitude to come within the traditional constitutional protection of "liberty." Whether this interest is characterized as a substantial expectation of release based on the importance of parole in the correctional process or as a state-created right, it is imperative that the discretionary authority to deny parole not be arbitrarily exercised. Every state and the federal government have established some form of parole release system. Of all prisoners annually returned to the community, 70 percent are released on parole. "Rather than being an ad hoc exercise of clemency, parole is [therefore] an established variation on imprisonment of convicted criminals." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972).

The decisions of this Court finding no inherently protected liberty interest in the conditions of continued confinement do not apply to the parole release process. Parole involves whether—and not where or how—a person shall be imprisoned. Unlike an altered condition of confinement involving no prospect of immediate release, the opportunity for liberty offered by parole release is

not "too ephemeral and insubstantial to trigger procedural due process protections . . . ." *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976).

Parole release and parole revocation are indistinguishable for constitutional purposes. The nature of the affected individual's interest in both decisions is identical: conditional freedom versus incarceration. The prisoner and parolee both "face a potential of substantial imprisonment." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 480. This common interest in liberty, however denominated, is within the protection of the Due Process Clause.

This conclusion is also dictated by the holding in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), that a prisoner has a protected liberty interest in the loss of good time credits where the State has created an entitlement to such a length-of-confinement-reducing benefit. The prisoner's chances for immediate release are not implicated by the forfeiture or withdrawal of good time credits. Nevertheless, the Court in *Wolff* concluded that the threat to liberty was sufficiently great to require constitutional protection. It would thus be incongruous to hold that the prospect of immediate release by means of parole is not likewise a sufficient liberty interest to be protected by the Due Process Clause.

Petitioners and the United States argue that minimal due process safeguards are not required in the parole release process because the determination involves the exercise of discretion. This contention was expressly rejected by the Court in *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 483. It is simply absurd to suggest that the more unexposed, unbridled, and unreviewable discretion in an administrative process, the more immune it becomes from even the most rudimentary procedures designed to promote fairness.

The attempts of the United States to distinguish the federal and most state parole systems from the Nebraska

scheme are unavailing. The Solicitor General concedes that the Nebraska parole laws create "an expectation that the state may not disappoint without following procedures required by the Due Process Clause." Brief for the United States at 36. He further acknowledges that the Nebraska parole laws permit "a number of more diffuse and discretionary criteria [to] be invoked to deny early release on parole." *Id.* at 35. The Solicitor General then proceeds to make the assertion that "the United States and most of the states employ . . . a discretionary system . . . under which the parole decision is committed to the *unfettered discretion* of the parole authorities." *Id.* at 21 (emphasis added). This claim is not supported by any citation to federal or state law. The explanation for this omission is readily understandable.

First, the federal parole statute is almost identical to the Nebraska legislation in three critical respects. Second, as demonstrated by the Survey of Federal and State Parole Laws prepared by *amici* and reproduced in Appendix B, Congress and the legislatures of 47 states have prescribed standards, criteria, or factors to guide the paroling authority in making parole release determinations. Under the Solicitor General's own analysis, a legitimate claim of entitlement exists in the federal and virtually all state parole systems because the government "has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings . . . ." Brief for the United States at 29.

II.

The prisoner's interest in freedom requires that at least four general procedures be mandated for parole release determinations. *Amici* believe, on the basis of experience with state and federal parole processes, that the following rights are essential to fair decisionmaking:

an effective hearing; a decision based on accurate information; a statement of reasons for parole denial; and an adequate record of the proceeding.

As shown by the survey of parole laws conducted by *amici*, many states currently provide some of these procedures. All these rights have been required in the federal parole system since the passage of the Parole Commission and Reorganization Act. They have proven to be effective and manageable. These federal safeguards deserve careful scrutiny in fashioning constitutional rules for the operation of parole systems.

The procedures mandated for parole revocation in *Morrissey* and for loss of good time credits in *Wolff* have not jeopardized the orderly administration of parole systems or prisons. The proposed procedures for parole release decisionmaking likewise will not unduly burden the parole process. These safeguards strike a reasonable balance between the legitimate interests of prisoners in fair decisions and the understandable need of parole boards for feasible methods of operation.

ARGUMENT

I.

THE DUE PROCESS CLAUSE APPLIES TO THE PAROLE RELEASE DECISION

Prisoners have an interest in their eventual release on parole that comes within the constitutional protection of "liberty." Release on parole is no "mere anticipation or hope of freedom," *Morrissey* v. *Brewer*, 408 U.S. 471, 482 n.8 (1972) quoting *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).[2] Rather, it is a fundamental and integral part of the correctional system, of enormous value to both the inmate and the state.[3]

The discretionary nature of the decision to release, like the discretionary decision whether to revoke, affects liberty in a sufficiently important way to invoke appropriate procedural protections. Indeed, the interest at stake in the parole release hearing is not constitutionally distinguishable from the valuable liberty this Court sought to protect in *Morrissey*. As Judge Fahy observed in *Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278:

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[2] *Bey* relied exclusively on *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), for this characterization. This dictum has been expressly rejected by the Second Circuit in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 927-28 & n.2 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974). It has also been rejected by most other Circuits. *See* Brief for United States at 33-34 n.18.

[3] In dissenting from the remand for consideration of mootness in *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976), Justice Stevens noted that the:

> "manifest importance [of parole] is demonstrated by (a) the vast number of parole release decisions that are made every year; (b) the importance of each such decision to the person affected by it; and (c) the extensive litigation, with varying results, which has developed in the federal courts." 429 U.S. at 61 n.1.

"The Board [of Parole] holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities."

A. Parole Is A Fundamental, Necessary Component Of The Correctional System, Not A Unilateral Hope Of Prisoners

This Court and others have recognized that the parole release decision is one of the most significant parts of an entire process which our political and social institutions have evolved for dealing with convicted persons. *Morrissey* v. *Brewer*, 408 U.S. 471, 477-80 (1972). For a variety of reasons, parole has come to be essential to the administration of post-conviction justice. The widespread, systematic reliance on parole release means that for most prisoners, in most states, the parole release decision is at least as important as the sentencing decision in determining how long they will be incarcerated. As the Attica Report attests, "[i]n practice, the Parole Board—not the judge—decides how long an inmate will serve time." *The Official Report of The New York State Special Commission on Attica* 93 (Bantam ed. 1972).[4]

[4] "Parole is an extension of the sentencing process. . . . The final determination of how much time an offender must serve is made by the parole authority." S. Rep. No. 94-369, 94th Cong., 1st Sess. 15-16 (1975).

The interest prisoners bring to the parole decision, therefore, is no "unilteral expectation" or "hope." In the parole decision, as in sentencing, the person duly convicted of a criminal offense no longer has an unqualified right to liberty. Nevertheless, the accused, whether appearing before a sentencing judge or a parole board, retains a constitutional interest in freedom that requires minimal standards of fair treatment. *See, e.g., United States* v. *Tucker*, 404 U.S. 443 (1972); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Townsend* v. *Burke*, 334 U.S. 736 (1948).[5] As the District of Columbia Circuit has stated, "where the . . . government has made parole an integral part of the penological system, . . . it is also essential that authority to deny parole not be arbitrarily exercised." *Childs* v. *United States Board of Parole, supra*, 511 F.2d at 1280.

Parole is the usual form of release from incarceration. Almost 300,000 prisoners are incarcerated in federal and state institutions. *Corrections Magazine*, June 1978, at 21. One-third of those prisoners are annually released from custody by means of parole. Uniform Parole Reports, *Parole in the United States: 1976 and 1977* 46-47 (1978). Of all prisoners returned to the community each year, parole is the method of release for about 70 percent. *Id.* at 55.[6]

[5] As the Second Circuit found in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974) (emphasis added):

"[T]he average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a *substantial 'interest'* in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty."

[6] In deciding that the parole revocation process was subject to certain minimal due process procedures, the Court noted the high incidence of parole revocation.

"[R]evocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%-45%

[Footnote continued on page 12]

Sentencing judges assume in setting maximum terms that inmates will be released earlier. Many judges have been known to tell the defendant that "you have the key to prison in your pocket." [7] The 1975 Survey of Sentencing Judges conducted by the Yale Law Journal demonstrates the widespread expectation of sentencing courts that prisoners will be released on parole. Two thirds of those experienced federal judges reported that they expected the defendants they sentenced to be released before serving the full term imposed. And nearly half expected release to come immediately upon eligibility. Project, *supra*, 84 Yale L.J., at 882-83, n.361. *See also* A. von Hirsch, *Doing Justice: The Choice of Punishment* 83 (1976).

Parole cannot be characterized as simply an alternative to a pardon, reserved for those few prisoners who may be said to be rehabilitated in prison.[8] "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972). Parole promotes several important governmental objectives. One such significant goal is the effective functioning of the correctional system: Experience indicates that it is imperative that the process by which the parole

[6] [Continued]
of all parolees are subjected to revocation and return to prison." *Morrissey* v. *Brewer, supra*, 408 U.S. at 479.

[7] *See* Newman, *Forward* to Project, 84 Yale L.J. 810, 812-13 (1975); *id.*, at 882, n. 361, 890 nn. 386-88; *see also Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278; *cf. United States* v. *Slutsky*, 514 F.2d 1222, 1229 (2d Cir. 1975).

[8] The force of this argument is greatly diminished by the growing disenchantment with the traditional correctional goal of rehabilitating prisoners through confinement. In fact, the demise of the so-called "medical model" is reflected in the fact that the United States Parole Commission no longer relies upon institutional performance in most cases. *See* P. O'Donnell, M. Churgin and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*, 27, 47-48, 68-69 (1977).

release decision is made be safeguarded against arbitrary action. In its report accompanying the new federal parole legislation, the Senate Judiciary Committee noted:

> "Parole is perhaps the most important item in the mind of every prisoner because it is his key to the door. *It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions.* The openness and sense of fairness that is intended in the provisions of this legislation will have the beneficial effect of allowing the participants in parole—the inmates—to understand their place in the system and to better appreciate what is expected of them." S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

In most states and the federal system, parole and the good-time laws also work hand in hand to keep prison populations down to acceptable levels, to mitigate the harshness of sentences, to minimize unwarranted disparities in sentencing, and, finally, to control prison behavior by offering incentives to discipline and participation in rehabilitative and vocational programs.[9] A system which depended merely on the unfulfilled, unilateral expectations of prisoners could not succeed in these functions. Instead, parole is regarded by inmates, prison administrators and parole officials as a pervasive fact of prison life, a carrot to be waved by rehabilitative staff and a stick to be wielded by guards and other correctional personnel to ensure good behavior.[10]

[9] *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 3-4 (1976); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U. L. Rev. 477 (1973); Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

[10] *See* Hearings Before Subcomm. No. 3 of House Comm. on Judiciary, 92d Cong., 2d Sess., Ser. 15, pt. 7-A, at 483, 493-94

[Footnote continued on page 14]

In most jurisdictions, this system of mutual expectations has been formally set down in statutes, rules or regulations; in a few others, it remains informal. In either system, however, definite and mutual expectations arise that most inmates will be released on parole at some time prior to the expiration of their maximum terms. As the South Carolina Department of Corrections has acknowledged:

> "Where parole is the common, almost universal, method of release from prison it comes to be viewed more often as a right—indeed it is the norm—than where it is granted reluctantly and rarely, and in jurisdictions with long statutory sentences, infrequent use of pardon, and no other alternative to sentence mitigation, parole becomes crucially important to inmates . . . ." South Carolina Department of Corrections, *The Emerging Rights of the Confined* 198 (1972).

Accordingly, the parole release process gives rise to a "state-created right"—a "liberty interest" with "its roots in state law." *Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). *See Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 1003 (1978) (parole); *Polizzi* v. *Sigler*, 564 F.2d 792 (8th Cir. 1977) (prison classification); *Childs* v. *United States Board of Parole*, *supra*, 511 F.2d at 1281.

B. Parole Is A Form Of Protected Liberty, Not A "Condition Of Confinement"

Recent decisions of this Court provide that a prisoner has no inherently protected liberty interest in the conditions of his continued confinement. In *Meachum* v. *Fano*, *supra*, 427 U.S. at 224 (1976), this Court held:

[10] [Continued]
(1972). In the federal system, an inmate who has forfeited satisfactory good time for disciplinary infractions cannot be granted parole. 28 C.F.R. § 2.29 (1977).

> "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution."

See also Moody v. *Daggett*, 429 U.S. 78, 88 n.9 (1976); *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976).

This case, however, involves not the location or conditions of confinement, but the length of confinement. Stated differently, parole release involves whether—and not where or how—a person shall be imprisoned. This distinction is fundamental to our notions of liberty and due process of law.[11]

The differences between this case and the situations in *Meachum* and other "conditions of confinement" cases are readily apparent. Unlike an altered condition of confinement involving no prospect of immediate release, the chance for freedom offered by parole release is not "too ephemeral and insubstantial to trigger procedural due process protections . . . ." *Meachum* v. *Fano*, *supra*,

[11] The Court suggested this critical difference in *Meachum*. "Confinement in any of the State's institutions is within *the normal limits or range of custody* which the conviction has authorized the State to impose." 427 U.S. at 225 (emphasis added).

The Court also emphasized in *Meachum* that "[o]ur cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect. See *Wolff* v. *McDonnell*, 418 U.S. at 556." 427 U.S. at 225.

In *Wolff* the Court announced the following guiding principle:

> "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." 418 U.S. at 555-56.

427 U.S. at 228. Unlike situations where "prison officials have discretion to transfer [a prisoner] for whatever reason or for no reason at all," *id.*, neither Congress nor the state legislatures has authorized parole boards to grant or deny parole on the basis of absolutely unfettered discretion without any prescribed criteria or standards. Unlike the parolee reincarcerated for conviction of new crimes and faced with a parole violator warrant, the denial of parole has a "present" and "inevitable effect upon the liberty interests . . ." of a prisoner. *Moody* v. *Daggett, supra,* 429 U.S. at 87. And unlike a prison official at a good time revocation proceeding, the paroling authority at a release hearing "holds the key to the lock of the prison." *Childs* v. *United States Board of Parole, supra,* 511 F.2d at 1278.

The proper conclusion is dictated by the holding in *Morrissey* v. *Brewer, supra,* that the decision to revoke parole affects a liberty interest protected by the due process guarantee. The interest of a prospective parolee and a parolee facing revocation is, of course, not precisely the same. Common sense suggests a factual difference between the present enjoyment of conditional freedom and a present interest in the likelihood of conditional freedom. The nature of the interest, however, is identical —freedom from incarceration.[12] As the Second Circuit has recognized, "the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d at 928. *See also Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz,* 576 F.2d 1274, 1278 (8th Cir. 1978). The prisoner hoping for parole and his former cellmate fearing reincarceration

[12] Any factual differences between the interest of a parolee and prospective parolee affect only the *degree* of procedural protections afforded. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* 408 U.S. at 481.

share one critical thing in common: both "face a potential of substantial imprisonment." *Morrissey* v. *Brewer, supra,* 408 U.S. at 480. For each his interest in

> "liberty . . . , although indeterminate, includes many of the core values of unqualified liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482.[13]

A holding that a prisoner has a constitutionally protected liberty interest in the parole release decisionmaking process follows *a fortiorari* from *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). In *Wolff,* the Court held that a prisoner has a protected liberty interest in the loss of good time credits where the State has created an entitlement to such a length of confinement-reducing benefit. Certainly, "the forfeiture of good time does not immediately deprive a prisoner of his freedom." *Drayton* v. *McCall,* No. 78-2030 at 4915 (2d Cir., Oct. 2, 1978). Nevertheless, the Court in *Wolff* thought the jeopardy to liberty posed by loss of good time—and the concomitant lengthening of confinement—was grave enough to warrant constitutional protection. It would thus be anamolous to hold that the prospect of immediate release by the length-of-confinement-reducing method of parole is not likewise a sufficient liberty interest to be protected by the Due Process Clause.

[13] In passing the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*), Congress sought to enact legislation guaranteeing "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). Congress recognized the significance of the outcome for a prisoner.

> "The denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. *The Constitution requires due process of law . . . .*" S. Rep. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

C. The Due Process Clause Applies To Expert, Discretionary Decisions Affecting Liberty

The fact that a particular parole decision is not necessarily dictated by any given set of facts does not, as the briefs for the petitioners and United States would have it, extinguish the prisoner's right and need to have evaluations made fairly and, to the extent facts are relevant, accurately. In *Morrissey*, this Court emphatically rejected the notion that a parole board's discretionary authority is inhibited, much less thwarted, by minimum standards of procedural fairness.

> "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." 408 U.S. at 483 (footnote omitted).

The failure to provide intelligible explanations for the denial of parole or to afford a reasonable opportunity for the inmate to contribute information and to respond to adverse evidence is at odds with fundamental notions of the way governmental agencies should operate to their own best advantage and to comply with minimal requirements of fairness. *See Wolff* v. *McDonnell*, *supra*, 418 U.S. at 555-58; K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* 126-133 (1969). In countless other areas of public life, administrative agencies empowered to make discretionary judgments are required by law to follow procedures designed to assure that, whatever the decision may be, it has been arrived at fairly and as accurately as possible. Such rules are as compatible with parole release decisionmaking as they are with the decisional process of other federal and state administrative bodies. This was clearly the judgment of Congress in enacting the new federal parole charter providing "an

infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975); *see also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975).

The Court's decisions in *Meachum*, *Montanye* and *Moody* are fully consistent with the conclusion that minimum due process protections are compatible with decisions entailing the exercise of discretion. Those cases turned on the absence of a protected interest in liberty, and not on any conclusion that the discretionary administrative process involved could not function effectively with a modicum of due process hearing requirements.[14] None of these decisions disturbs the Court's finding in *Morrissey* that, even though the nature of the decision is largely "a discretionary matter," a "simple factual hearing will not interfere with the exercise of discretion." 408 U.S. at 483.[15]

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[14] The holding in *Meachum* was not predicated on whether the decision was "discretionary." The prison transfer decision in *Meachum* was subject to no standard whatsoever. 427 U.S. at 228 ("discretion to transfer [the prisoner] for whatever reason or for no reason at all."). The Massachusetts legislature had authorized a totally arbitrary administrative scheme—"unbridled discretion" as the Solicitor General suggests. Brief for the United States at 36. As the First Circuit pointed out in a related decision, "[f]reedom from transfer is not a 'liberty interest' since an inmate may be transferred *at the whim* of the Commissioner." *Four Certain Unnamed Inmates of Mass. Correctional Institution at Walpole, Mass.* v. *Hall*, 550 F.2d 1291, 1292 (1st Cir. 1977) (emphasis added); *Tracy* v. *Salamack*, 572 F.2d 393, 395, n.9 (2d Cir. 1978).

[15] The assertion that discretionary determinations are not amenable to due process protections has been flatly rejected by other courts. For example, in *Haymes* v. *Regan*, 525 F.2d 540 (1975), the Second Circuit held that due process must be accorded to a parole applicant notwithstanding the fact that "the Parole Board is invested with vast discretionary authority in deciding whether and when parole release is appropriate." 525 F.2d at 543. Moreover, the Second Circuit added, due process protections might improve the discretionary process. "The task of the reviewing body thus might well be eased by the formulation and promulgation of more precise rules and criteria." 525 F.2d at 543.

On the contrary, a settled line of authority in this Court establishes that minimum due process safeguards may be even more important where the decision is highly discretionary. As Justice Frankfurther pointed out in his landmark concurrence in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 171-72 (1951):

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

The logical extreme of the argument advanced by petitioners and the United States is that the more unexposed, unbridled, and unreviewable discretion in an administrative process, the more immune it becomes from even the most rudimentary procedures designed to promote fairness. This contention is an open invitation to this Court " 'to sacrifice good sense to a syllogism'—to find in the [*Meachum*] doctrine an infinite elasticity." *Gertz* v. *Welch*, 418 U.S. 323, 399 (1973) (White, J., dissenting) (footnote omitted). The decisions of this Court long ago repudiated the pernicious notion that, in matters affecting the liberty of a person, a legislative grant of authority to a government decisionmaker—involving "a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached"—confers on that body "a license for arbitrary procedure." *Kent* v. *United States*, 383 U.S. 541, 553 (1966).[16]

[16] "[I]t appears anomalous for the courts to be totally unable to require procedures when the state leaves the decision regarding a benefit to administrative discretion by failing to grant a

[Footnote continued on page 21]

In recent years, numerous studies of state and federal parole systems have prompted calls for sweeping reforms.[17] A constant cause for criticism has been "the existence . . . of discretionary power in the hands of . . . parole boards . . . ." *Struggle for Justice: A Report on Crime and Punishment in America Prepared for the American Friends Service Committee* 124 (1971). In passing the new federal parole statute, the House Judici-

[16] [Continued]

'substantive right,' and to be free to mandate procedures when the state does establish a substantive right and provides rudimentary statutory procedures for the benefit's termination. Why should the courts on the one hand be paralyzed when a state permits its officials to engage in utterly discretionary decision-making, and on the other hand be commissioned with the full power of procedural review when a state improves this situation by crystallizing a substantive right and establishing procedures? Plainly it is absurd to say that total arbitrariness is immune from constitutional attack, while less-than-total arbitrariness must be struck down." Comment, "Two Views of a Prisoner's Right to Due Process: *Meachum* v. *Fano*," 12 Harv. C. R. C. L. L. Rev. 405, 418-19 (1977).

[17] Parole has fallen into such disrepute that a growing number of critics has called for abolition of parole. *See generally*, A. von Hirsch, *Abolish Parole?* (1978); P. O'Donnell, M. Churgin and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 12-13, 21-28, 68-69 (1977); D. Stanley, *Prisoners Among Us: The Problem of Parole* 186 & n. 45 (1976). After deliberating two years, the prestigious Joint Committee on the Legal Status of Prisoners of the American Bar Association

> "concluded that continued reform at the margin of current sentencing practices is no longer justified and that more substantial changes are in order. Accordingly, the standards propose the abolition of parole as it is currently practiced in most American jurisdictions. The Committee finds increasing support for the abolition of parole. Maine became the first state to implement a flat sentence system. ME. REV. STAT. ANN. tit. 17-A, §§ 1253-54 (1975). Similar proposals are being considered in several jurisdictions including Minnesota. California and Indiana have recently enacted such legislation to take effect July 1, 1977." American Bar Association, Standards Relating to the Legal Status of Prisoners § 9.1(a), comment (a) (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 592 (1977).

ary Committee criticized the uncontrolled exercise of discretion by parole decisionmakers. "The parole system has long been recognized as the single most unequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). The recent American Bar Association inquiry cited as a major abuse the fact that a prisoner "is placed under the largely unreviewable discretion of a board who determines the length of his confinement on the basis of factors either unknown to him or unknown to it." American Bar Association, Standards Relating to the Legal Status of Prisoners § 9.1(a), comment (a) (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 591 (1977).

After a detailed review of California's parole release procedures, the Committee on Criminal Justice of the State Bar of California recommended that release review hearings be conducted in a manner affording the prisoner procedural due process. This recommendation was based on findings that, despite the importance of the release decision to the inmate,

> "[r]elease decisions made by the Adult Authority under the former procedure were arbitrary, capricious, subjective, ungoverned by rational standards, and grossly unfair in operation.
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> * * * *
>
> "At the release hearings, individualized justice appears to be administered in a manner which is regularly . . . contrary to our democratic ideal that laws and not men control the substantial rights of people." State Bar of California Committee on Criminal Justice, *Report and Recommendations on Sentencing and Prison Reform* 4, 146 (1975).

A decision upholding the argument advanced by petitioners and the United States would seriously undermine this Court's trend of decisions requiring minimum procedural safeguards for "protection of the individual

against arbitrary action of government." *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 558 (citation omitted). The legitimate exercise of discretion by parole boards is not jeopardized by requiring a few procedures to assure fairness. See *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 483 ("A simple factual hearing will not interfere with the exercise of discretion.") What is jeopardized by a contrary decision, however, is our long-standing commitment to the proposition that purely "[a]rbitrary action is not due process." *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670, 678 (1967).

D. Nebraska State Law, Like Federal Law, Creates A Liberty Interest In Parole Release

Both petitioners and the United States discuss extensively whether Nebraska's parole law constitutes an entitlement vesting prisoners with a constitutionally protectable liberty interest. Brief for Petitioners at 17-20; Brief for United States at 20-21, 24-37. *Amici* believe that, as we have discussed in the preceding sections of this brief, the parole release decision, by its very nature, implicates constitutional "liberty" in the fundamental sense of "freedom from bodily restraint." *Meyer* v. *State of Nebraska*, 262 U.S. 390, 399 (1923). For that reason, the Court need not examine whether state law creates a "legitimate claim of entitlement" in this case. Compare *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (property), with *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 482 (1972) (liberty). If the Court looks to state law, however, it will find that the Nebraska parole statute, like federal law, also creates a "liberty interest" in parole. Cf. *Wolff* v. *McDonnell*, *supra*, at 577 (1974).

1. *The Nebraska Statute*

In its argument, Nebraska relies on the purportedly dispositive constitutional significance of the statutory phrase "shall order his release unless . . . ." NEB. REV.

STAT. § 83-1, 114(1) (1976). Nebraska contends that the legislature created no entitlement by the use of these words, which merely "constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions." Brief for Petitioners at 18.

This argument is untenable. First, Nebraska ignores the fact that similar language in its own good-time statute was held in *Wolff* to create a liberty interest protected by the Fourteenth Amendment. *See* 418 U.S. at 557.[18] Second, the plain language of the statute, as the Solicitor General recognizes, gives "every Nebraska prisoner a legitimate claim of entitlement to release on parole, subject to defeasance only if the parole authorities find one of a limited number of things." Brief for the United States at 35.[19] The experienced Nebraska federal judge who tried this case also found that the statutory scheme creates a "liberty" interest. Pet. App. 29-36. This determination was upheld by the Court of Appeals and is entitled to deference. *Bishop* v. *Wood*, 426 U.S. 341, 345-47 (1976).

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[18] Nebraska law limited the prison administrator's discretion in ordering forfeiture or withholding good time. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges." 418 U.S. at 545, n.5. Only in such "flagrant or serious cases" was the administrator permitted to forfeit or withhold a prisoner's good time.

[19] Nebraska's provision ("shall order his release unless") is even more forthright and explicit than the statutory "for cause" limitation on dismissals of federal government probationary employees held in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), to create a "property" interest in continued federal employment, and thus to implicate the Due Process Clause. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9-12 (1978); *Dixon* v. *Love*, 431 U.S. 105, 107-12 (1977).

According to the Solicitor General's analysis of *Arnett*, such a statutory requirement of a showing of "good cause" to justify departure from the norm, "[a]lthough this requirement of 'good cause' is surely vague, and calls for discretionary decisions," establishes "a property interest that could be terminated only in accord with procedures established by the Due Process Clause. See 416 U.S. at 165-166 (opinion of Powell, J.), 177-186 (opinion of White, J.), 207-211 (Marshall, J., dissenting)." Brief for the United States at 36.

The Solicitor General also disputes Nebraska's additional argument that no entitlement is created because the parole statute, unlike its law allowing forfeiture of good time credits for only serious misconduct, permits "a number of more diffuse and discretionary criteria [to] be invoked to deny early release on parole." Brief of the United States at 35. The Solicitor General reasons as follows:

> "But *Meachum* involved essentially unbridled discretion . . . . Here, however, *there is a statutory presumption in favor of parole; administrative discretion is not unbridled.* The Nebraska parole statute is quite similar to the federal statute involved in *Arnett* v. *Kennedy*, [416 U.S. 134 (1974)], and in *Arnett* six Justices concluded that the statute had created a property interest.
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> ". . . Here, as in *Wolff* and *Arnett*, a statute has created an expectation that the state may not disappoint without following procedures required by the Due Process Clause." *Id.* at 36 (footnote omitted; emphasis added).

2. *The Federal Parole Scheme Parallels Nebraska's System*

In 1976 Congress passed comprehensive parole reform legislation designed to curb abuses of the discretionary authority vested in federal parole officials by making the federal parole system fairer, more intelligible, and more predictable. In terms of the standards governing parole release, the pertinent language[20] provides that a federal "prisoner *shall be released*" if he has

> (a) "substantially observed the rules of the institution or institutions to which he has been confined"; and

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[20] Pertinent provisions of the Parole Commission and Reorganization Act, as well as the Parole Commission's regulations, are set forth in Appendix A of this Brief.

(b) "if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

"(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

"(2) that release would not jeopardize the public welfare." 18 U.S.C. § 4206(a) (emphasis added).[21]

The federal parole laws are a virtual carbon copy of Nebraska's parole legislation in three significant respects. First, Nebraska law requires that every prisoner shall have a release hearing "within sixty days before the expiration of his minimum term less any reductions." NEB. REV. STAT. § 83-1, 111(1) (1976). Likewise, federal law requires that the Parole Commission "shall conduct a parole determination proceeding . . . not later than thirty days before the date of . . . eligibility for parole." 18 U.S.C. § 4208(a).[22]

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[21] The federal parole statute further provides that the Parole Commission must make the release decision "pursuant to guidelines promulgated by the Commission . . . ." 18 U.S.C. § 4206(a). The Parole Commission may deviate from these guidelines only "if it determines there is *good cause* for so doing . . . [and] . . . the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon." 18 U.S.C. § 4206(c) (emphasis added). *See* note 19, *supra*.

[22] The quoted provision pertains to prisoners whose sentences, pursuant to 18 U.S.C. § 4205(a) and 18 U.S.C. § 4205(b)(1), prescribe that they shall be eligible for parole after serving one-third of their sentences or at some fixed point less than one-third of their sentences. Prisoners sentenced pursuant to 18 U.S.C. § 4205(b)(2) are eligible for parole whenever the Parole Commission may determine. Congress has required that their parole determination proceedings "shall be held not later than one hundred and twenty days following such prisoner's imprisonment . . . in a Federal institution . . . ." 18 U.S.C. § 4208(a).

A hearing is understandably not required if the Parole Commission "determines on the basis of the prisoner's record that the prisoner will be released on parole." 18 U.S.C. § 4208(a).

Second, Nebraska law specifies particular factors that must govern the release decision. In considering an eligible prisoner, the Nebraska Board of Parole "shall order his release unless it is of the opinion that his release should be deferred" because of one of four reasons. NEB. REV. STAT. § 83-1, 114(1) (1976). One such condition is that "[h]is release would depreciate the seriousness of his crime or promote disrespect for law." *Id.* § 83-1, 114(1)(b). Similarly, Congress has mandated specific criteria which the Parole Commission must follow in a parole determination proceeding. A "prisoner shall be released" if, among other things, his "release would not depreciate the seriousness of his offense or promote disrespect for the law . . . ." 18 U.S.C. § 4206(a)(1).[23] These provisions of the Nebraska and federal parole laws are derived from the same source—the Model Penal Code. *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 48 (1976).[24]

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[23] Nebraska law also permits denial of parole if "[t]here is a substantial risk that [the prisoner] will not conform to the conditions of parole . . . ." NEB. REV. STAT. § 83-1,114(1)(a). The corresponding federal standard permits withholding of parole if the prisoner's "release would . . . jeopardize the public welfare . . . ." 18 U.S.C. § 4206(a)(2). These provisions express the theory of sentencing commonly termed "incapacitation." *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 11-13, 48 (1976).

[24] The Model Penal Code provides:

"Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, *it shall* be the policy of the Board to *order his release, unless* the Board is of the opinion that his release should be deferred because:

"(a) there is a substantial risk that he will not conform to the conditions of parole;

"(b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law;

"(c) his release would have a substantially adverse effect on institutional discipline; or

"(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially

[Footnote continued on page 28]

Third, the plain language and operation of the Nebraska parole statutes demonstrate that the legislature opted for an administrative system incorporating a presumption in favor of release, but at the same time permitting the exercise of informed discretion to deny parole if the Parole Board determines that one of the statutorily-enumerated reasons for denial applies in a given case. By the same token, Congress has enacted an almost identical statutory scheme reflecting "a similar, more positive, policy." *Id.*

3. *The Argument of the United States Rests On Plainly Erroneous Assumptions*

Given these remarkably close parallels between the Nebraska and federal parole laws and the Solicitor General's unequivocal argument that a Nebraska-type parole statute creates an "expectation that the state may not disappoint without following procedures required by the Due Process Clause,"[25] the Solicitor General would be expected to take the same position with respect to the federal parole statutes. Remarkably, the United States, without critically examining, much less quoting, the federal parole laws, declares that the "United States and most of the states employ . . . a discretionary system . . . under which the parole decision is committed to *the unfettered discretion* of the parole authorities." Brief for the United States at 21 (emphasis added); *see also id.* at 4, 15, 21, 31, 32 n.7 (semble), 38 n.19. In terms of the parole laws of the United States and almost all states, the Solicitor General is sorely mistaken.

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[24] [Continued]
enhance his capacity to lead a law-abiding life when released at a later time." American Law Institute, Model Penal Code § 305.9(1) at 104-05 (P.O.D. 1962) (emphasis added).

[25] Brief for the United States at 36; *see also id.* at 4, 15, 19, 21.

a. *The "Unfettered Discretion" Assumption*

First, as we have shown, Congress has clearly created a parole system which does not allow the Parole Commission to deny parole "for whatever reason or for no reason at all." *Meachum* v. *Fano, supra*, 427 U.S. at 228. Pursuant to 18 U.S.C. § 4206(a), the Commission's exercise of discretion is governed by specific, legislatively-prescribed criteria.[26] Borrowing from the Solicitor General's own analysis, we can see that, because decisions to grant or deny parole in the federal system "turn on particular findings . . ." (such as potential jeopardy to the public welfare), a prisoner has a "legitimate claim of entitlement." Brief for the United States at 30.[27]

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[26] One misstatement in the Solicitor General's brief is characteristic of the seriously flawed premises underlying the position of the United States. The Solicitor General categorically states:

> "The United States does not have . . . a set of rules of general applicability establishing substantive release criteria binding on the decision maker." Brief for the United States at 38, n.19.

This assertion would undoubtedly come as a complete surprise to the members of Congress who mandated specific parole release criteria in 18 U.S.C. § 4206(a), and to the Parole Commission which has bound itself to follow a system of "guidelines for parole release consideration" in order "[t]o establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decisionmaking without removing individual case consideration . . . ." 28 C.F.R. § 2.20(a) (1977).

[27] The Brief for the United States takes inconsistent positions on the effect of discretion in a parole system in determining whether a prisoner has a government-created entitlement to release sufficient to be protected by the Due Process Clause. In one context, the Solicitor General argues that no entitlement can be found "[s]o long as the system of release is fundamentally *an exercise of informed discretion* . . . ." Brief for the United States at 32 (emphasis added). Yet the Solicitor General later argues that the Nebraska parole law creates a legitimate entitlement even though "a number of . . . diffuse and discretionary criteria may be invoked to deny early release on parole." *Id.* at 35. At another point, the Solicitor General argues that a constitutionally protected expectation is created by parole laws which provide criteria for decision-making so that "administrative discretion is not unbridled." *Id.* at

[Footnote continued on page 30]

Second, the Solicitor General's unsubstantiated generalization about the parole laws of "most of the states" is simply incorrect. For purposes of this case, *amici* have reviewed the parole statutes of the fifty states. The results of this study are set forth in Appendix B of this Brief.[28] From available information,[29] it can be seen that the legislatures of 47 states have prescribed standards, criteria, or factors to guide the paroling authority in making parole release determinations.[30] Many of these states have adopted standards identical or very similar to the release criteria in the Model Penal Code, after which the Nebraska and federal parole statutes are modeled. A common formulation provides that a prisoner may be released on parole "if (1) it appears . . . that there is reasonable probability that such inmate will live and remain at liberty without violating the law and (2) such release is not incompatible with the welfare of

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[27] [Continued]

36. *Amici* suggest that the Solicitor General's inconsistent arguments are the inevitable result of an *ad hoc* approach to this question.

[28] For the convenience of the Court, we have also included in Appendix C a table of official citations of the state parole laws.

[29] The sources of information for this review were the most recently available state statutes and an empirical study of state parole board laws and practices. *See* V. O'Leary & K. Hanrahan, *Parole Systems in the United States* (3d ed. 1976). *Amici* did not have access to most of the various regulations, policy statements and other interpretative materials which many state parole boards use to structure the exercise of their discretionary authority. *See, e.g.*, Kentucky Administrative Regulations, Kentucky Parole Board, ch. 1 (1977); New York State Compilation of Rules and Regulations, Division of Parole, tit. 9, § 8000 *et seq.* (1978).

[30] Only three state legislatures appear to have provided no explicit statutory guidance to their parole release decisionmakers. *See* ME. REV. STAT. tit. 34, § 1552 (1978); WASH. REV. CODE ANN. § 9.95.110 (1977); WYO. STAT. § 7-13-402 (1977). Each of these state parole laws, however, authorizes the parole board "to promulgate reasonable rules and regulations . . . *which shall establish the general conditions under which parole shall be granted and revoked.*" WYO. STAT. § 7-13-402(d) (1977).

society." CONN. GEN. STAT. Ann. § 54-125 (West Conn. Supp. 1978); *see also* MASS. GEN. LAW. Ann. ch. 127, § 130 (West 1972); TENN. CODE ANN. § 40-3614 (Cum. Supp. 1978); COLO. REV. STAT. § 17-1-201(3)(c) (Cum. Supp. 1976).

Constitutional adjudication affecting the lives of thousands of prisoners should not be grounded on speculation and conjecture or based upon the rhetorical flourishes of appellate counsel. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 420 (1974) (considerations urged by New Jersey's counsel in parole case proved irrelevant in practice to State parole board). Virtually all states have placed statutory restraints on paroling authorities to assure that "administrative discretion is not unbridled." Brief for the United States at 36. Again borrowing from the Solicitor General's own analysis:

> "[a] legitimate claim of entitlement exists . . . when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. . . . Where the state has bound itself to extend or confer a benefit, or withhold a sanction, on the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that those findings will be made fairly and accurately." Brief for the United States at 29-30.

b. *The "Presumption In Favor of Release" Fallacy*

The United States also argues that constitutionally-protected entitlement to release may be found if a state, like Nebraska, "sets up a presumption in favor of release" in its parole statute. Brief for the United States at 32; *see also id.* at 34, 36. The Solicitor General claims

that such a presumption is "missing from the federal parole statute and from most other state statutes . . . ." *Id.* at 35. This position is unsound for three reasons.

First, as we have shown, almost all state statutes conform to the controlled discretion model which the United States concedes confers a legitimate entitlement to release.

Second, as we have also shown, the federal and Nebraska parole statutes are virtually identical in all critical respects, including release criteria and the use of the phrase "shall release." The Solicitor General has conceded that a Nebraska-type statute creates a presumption in favor of release requiring due process protections.

Third, *Wolff* v. *McDonnell* dictates that, whatever the language of a state's parole statute, due process applies to the parole release determination. The Court's rationale in part for finding a protected liberty interest in *Wolff* was the existence of a *state-created right to a means of reducing the length of confinement* through the earning of good time credits under stipulated criteria.

> "Nebraska may have the authority to create, or not, *a right to a shortened prison sentence* through the accumulation of credits for good behavior . . . . But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." 418 U.S. at 557 (emphasis added).

Good time laws and parole are constitutionally indistinguishable. Good time credits lower the period for mandatory release, while the grant of parole effectively suspends the remainder of the originally prescribed period

of incarceration. In the case of good time credits and parole, the practical effect is the same: shortening the amount of time spent in prison.[31] *Wolff* therefore requires that the prisoner's interest in reducing his prison time—whether by means of parole or good time credits—be constitutionally protected.

The arguments of the United States confirm the danger of predicating entitlement to precious constitutional rights on elusive semantical nuances. The degree of due process protection afforded prisoners should not turn on the rules of grammar and syntax. All states and the federal government have established a system for releasing prisoners on parole. The government-created right is to be paroled some time either "if" certain qualifying conditions are satisfied or "unless" certain disqualifying circumstances exist. It is the practice of granting parole to seven out of every ten prisoners, and not the precise words of any statute, which creates an entitlement worthy of constitutional protection. As Justice Frankfurter, speaking for the Court, observed:

> "Settled state practice . . . can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville C. & St.L.Railway* v. *Browning*, 310 U.S. 362, 369 (1940). *Cf. Monell* v. *New York City Dept. of Soc. Serv.*, —— U.S. —— & n.56 (June 6, 1978); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) ("custom or usage" as constituting state law under 42 U.S.C. § 1983).

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[31] In practice, parole has a more substantial effect in reducing the term of a prisoner's incarceration. For example, under federal law, an inmate's length of confinement can be reduced by as much as one-third by earning good time credits. On the other hand, parole operates to reduce the average term of imprisonment by as much as one-half. P. O'Donnell, M. Churgin and D. Curtis, *Toward A Just and Effective Sentencing System: Agenda for Legislative Reform* 70 (1977).

"In our view, . . . it would exalt form over substance if this distinction [based on the precise words chosen by a legislature] were found to justify a result different from that in [*Wolff*]." *Wolman* v. *Walter*, 433 U.S. 229, 250 (1977).

II.

THE INTERESTS AT STAKE REQUIRE AT LEAST FOUR PROCEDURAL PROTECTIONS BEFORE PAROLE MAY BE DENIED

Once it is concluded that the Due Process Clause applies to parole release decisions, the question of "what process is due" arises. *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481. As a constitutional minimum, sufficient process must be accorded so that a prospective parolee has an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). *Amici* believe that at least four general procedural rights are constitutionally required to promote fair parole release decisionmaking: an effective hearing; a decision based on accurate information; a statement of reasons for parole denial; and an adequate record of the proceeding.

A. The Interests At Stake

What procedures are required vary with the nature of the private interest affected by the official act, the public interest in the process, the risk of error in decisions based upon minimal procedures, and the value and costs of additional safeguards. *Dixon* v. *Love*, *supra*, 431 U.S. at 112-13; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 334-35. For the prisoner being considered for parole, the private interest at stake is freedom itself—a fundamental human right protected by the Constitution. In a society which provides procedural protection to the right to freedom from a violation of physical integrity (*Ingraham* v. *Wright*, 430 U.S. 651, 673-74 (1977)), and the right to continued utility service (*Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978)), surely freedom is to be accorded substantial protection.

The state has a parallel interest in the efficient administration of the parole system, and in preserving the integrity and appearance of integrity of the parole process. This interest is dictated by the unique and well-established role of parole release in the criminal justice system and rehabilitative process. Because an inappropriate grant *or* denial of parole may undercut the retributive, deterrent and incapacitative functions of sentencing, parole release decisions must not be arbitrary and must be based on all available accurate data. *See, e.g., United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, *supra*, 500 F.2d at 932-33.

The American Bar Association has recognized the mutual interests of the state and the prisoner in fair procedures. The Joint Committee on the Legal Status of Prisoners recommended that

> "release decisions be arrived at through fair procedures that insure substantial participation by the prisoner. Although the development of guidelines and the use of goals other than rehabilitation may minimize the potential for factual disputes in the decision-making process, the power of the releasing authority to formulate decisions outside the guidelines and the nature of the guidelines themselves dictate that procedures be fair and open. As in other circumstances where the Committee has recommended procedural regularity, it believes not only that the apperance of justice will be improved but that the factual basis for decisions will be enhanced." American Bar Association, Standards Relating to the Legal Status of Prisoners (Tent. Draft 1977), *in* 14 Amer. Crim. L. Rev. 377, 598 (1977).

This concern with fairness and accuracy is shared by society in general since it, too, has a substantial interest in the integrity and success of the rehabilitative process. To fulfill its promise to society, parole must not frustrate or embitter prisoners by subjecting them to what are, or appear to be, arbitrary or irrational decisions based on caprice or inaccurate information.[32] The importance of parole's impact on the rehabilitative process, recognized by this Court in the revocation context in *Morrissey*,[33] is heightened in the parole release decision setting. The greater number and greater public awareness of parole release decisions, as compared with revocations, make their fairness all the more crucial. Additionally, premature release of a prisoner may impose additional costs on society in the form of additional crime, while an erroneous denial results in the high cost of continuing imprisonment and prevents the prisoner from becoming a productive citizen.

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[32] The Attica Commission found that "[f]ar from instilling confidence in the Parole Board's sense of justice, the existing procedure merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning." *Official Report of The New York State Special Commission on Attica* 98 (Bantam Books ed. 1972); *see also id.* at 97. Two of the "Fifteen Practical Proposals" put forward by the Attica inmates related directly to parole. *See* T. Wicker, *A Time To Die* 317 (1975).

[33] "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino* v. *Warden*, 27 N.Y.2d 376, 379, and n.2, 267 N.E.2d 238, 239, and n.2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at 484.

These considerations flowing from the state's and society's interests in ensuring the integrity of the parole process are consistent with the prisoner's interest in "liberty" through conditional freedom from incarceration. He, too, has an interest in the release decision being made on the basis of accurate data. He, too, has an interest in having all such available data before the decisionmaker. And, perhaps most importantly, he, too, has an interest in being free from arbitrary decisions or decisions cloaked in secrecy and influenced by irrational, inconsistent or impermissible criteria. *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d at 929. In the absence of any indication of how decisions are made or on what factors they are based, prisoners are left to counterproductive speculation and are deprived of an important incentive and guide to future conduct. *See Morrissey* v. *Brewer, supra*, 408 U.S. at 484; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d at 932-33. "'One can imagine nothing more cruel, inhuman and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for release.'" K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* 132 (1969), *quoting* Porter, *Criteria for Parole Selection, in* Proceedings of American Correctional Association at 227 (1958).

In addition to these interests, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" must be considered. *Mathews, supra*, 424 U.S. at 335. The costs of any such additional procedures must also be examined. *Ingraham, supra*, 430 U.S. at 680-81; *Mathews, supra*, 424 U.S. at 348.

Secondary sources and the experience of *amici* suggest that serious factual error is not uncommon in the files relied upon by parole authorities. *See, e.g.*, Project, *supra*,

84 Yale L.J. at 833-35.[34] Parole decisions are not made "in response to conduct directly observed" by the decision-makers. Prisons are closed, not open institutions. *See Ingraham, supra,* 430 U.S. at 677-78. Decisions are not "largely automatic." *Compare Dixon* v. *Love,* 431 U.S. 105, 113 (1977). And parole board members, unlike the teachers in *Ingraham,* are generally immune from personal court action based on their official conduct. *Cruz* v. *Skelton,* 502 F.2d 1101 (5th Cir. 1974); *United States ex rel. Harrison* v. *Pace,* 380 F.Supp. 107, 111 n.4 (E.D.

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[34] As researchers for the United States Board of Parole have complained:

> "Unfortunately, the files are not uniformly complete and frequently include obviously conflicting information [such as vocational or educational programming and drug use].
>
> "In one file, an inmate was listed as an illiterate who spoke only Spanish at admission. A later report listed the inmate as having completed 40 hours of college credit . . . .
>
> "Instances of misfiling are frequent. Often a report will indicate that the same subject is a white male, while the picture in that same file shows what appears clearly to be a black (or vice versa). Presentence reports are often found inaccurately filed . . . .
>
> "Numerous examples of discrepancies in the files could be cited [such as birth dates and date of first arrest] . . . .
>
> "The inmate's arrest record is an important source [of information]. In many cases no specific information is given about the number of prior arrests, convictions, dates, fines, or time actually served. The Federal Bureau of Investigation arrest records which appear in many of the files are very difficult to use, since the same arrest and conviction may be entered six or seven times at each stage of arrest, transfer, conviction, and incarceration; and dispositions often are not shown.
>
> ". . . [This] lack of uniformity, clarity, and concern for the accuracy of information [in prison files] sets obvious limits upon the quality of information which may be reliably extracted from the files . . . ." S. Singer & D. Gottfredson, *Development of a Data Base for Parole Decision-Making* 2-5 (NCCD Research Center, Supp. Report No. 1, 1973).

Pa. 1974). All of these factors suggest a level of risk of error indicating the necessity for procedural safeguards.[35]

B. Current Practices In The State And Federal Systems

In making the actual determination of which procedural protections are constitutionally required under the circumstances, this Court has mandated scrutiny of current practices and consideration of the utility and value of additional safeguards. This scrutiny allows the Court to perform the balance contemplated by *Mathews.* 424 U.S. at 335.

Such a review of the current practices under state and federal parole laws reveals that most jurisdictions provide more procedural protections than those found inadequate in Nebraska. The Survey of Federal and State Parole Laws, prepared by *amici* and reproduced in Appendix B, reveals that almost all states currently provide, by statute or judicial decision, a spectrum of procedural protections designed to preserve the rights of prisoners seeking parole. These systems function effectively under these procedures despite dire forecasts of crippling administrative burdens.[36]

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[35] As the Solicitor General points out, this Court has ruled that: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases . . ." *Mathews* v. *Eldridge, supra,* 424 U.S. at 344, *quoted in* Brief for the United States at 44.

[36] The United States suggests that the incorporation of minimal procedural protections into parole proceedings could inhibit "future experimentation and alteration of the parole release process . . . ." Brief for the United States at 5.

In terms of the federal parole system, this argument is contrary to the express judgment of Congress in passing the Parole Commission and Reorganization Act. As we have demonstrated, both committees in the House and Senate were well aware that the discretion of the Parole Commission was being circumscribed to a certain extent and that the legislation provided for "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th

[Footnote continued on page 40]

That current state practice and policy increasingly recognizes procedural safeguards was applauded by the American Bar Association:

> "Procedural safeguards have been imposed on parole release decisions through legislation. In some states, parole boards are required by statute to hold hearings on parole release. And some recent cases on the federal level have indicated that the Administrative Procedure Act is applicable to the United States Board of Parole . . . . *King* v. *United States*, 492 F.2d 1337 (7th Cir. 1974); *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).
>
> "The American Law Institute Model Penal Code recommended that prisoners be given an informal hearing on the issue of parole release and that in preparation for parole the prisoner be able to advise with persons of his own choosing including his own legal counsel. § 305.7. The National Advisory Commission went further recommending disclosure of information, reasons for decision, and representation by counsel if required. NAC, § 12.3 (1973). See also, Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1519 (1972); Comment,

[36] [Continued]
Cong., 1st Sess. 2 (1975); *see also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975). If Congress was not troubled that these parole reforms would retard the further development of a fair and effective parole process, we submit that the Court should likewise not be concerned.

Moreover, imposing a requirement that a process be fair is a far cry from a judicial takeover of the parole process. Parole boards will remain free to exercise their traditionally broad discretion, to devise standards and criteria for release best suited to the needs of their respective states, and to experiment with new procedures to enhance the reliability and integrity of their decisions. "The few basic requirements set out above . . . should not impose a great burden on any State's parole system." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 490.

> *Procedural Protections at Parole Release Hearings: The Need for Reform*, 1974 Duke L.J. 1119.
>
> ". . . The Committee recommends a hearing with the prisoner present in all parole release decisions." American Bar Association, Standards Relating to the Legal Status of Prisoners (Tent. Draft 1977), *in* 14 AMER. CRIM. L. REV. 377, 598 (1977).

C. The Need For Safeguards

Current practice in Nebraska mandates the consideration of a number of factors in the parole release decision. The Parole Board must consider the inmate's background, personal history, family and social connections, employment history, criminal behavior, adjustment in prison, and current status and behavior. *See* NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). To make its decision in accordance with statutorily-mandated criteria, the Board thus requires a substantial factual record. To be meaningful, this record must be both accurate and current. As a result, to ensure fairness and to prevent arbitrary, capricious, or simply misinformed judgments, effective procedural safeguards must be afforded.[37]

Amici respectfully submit that the requisite minimum due process procedures for parole decisionmaking are:

1. The right to an effective hearing, including the right to advance notice of time and criteria, the right to a personal appearance, and the right to be accompanied by a representative;

[37] Nebraska's procedures at the initial and critical parole review are deficient in several respects. First, neither advance notice of the time of the hearing nor of the criteria to be applied is provided to the prisoner. Second, prisoners are not given access to the information used by the Board in reaching its decision; nor are they given the right to reply to the information presented in all cases. Third, prisoners are not advised of the reasons for which parole was denied. Finally, prisoners are not given a record of the proceedings, or even summaries of the evidence relied on by the Board.

2. The right to have the decision based on accurate information, including prior access to files and the right of reply;

3. The right to a written statement of the reasons on which the decision was based; and

4. The right to a record of the proceedings, capable of being reduced to a transcript.[38]

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[38] The American Bar Association's study group has recommended similar release procedures.

"9.2 Procedures for Determining the Length of a Sentence to Imprisonment

(a) Prisoners should have a hearing within 90 days of their confinement for the purpose of establishing the date of their release.

(b) At least 15 days prior to the hearing, the prisoner should be notified of:

(i) The time and place of the hearing and his rights and the procedures applicable thereto;

(ii) The names of persons known to the releasing authority who will present testimony at his hearing and the likely nature of their testimony;

(iii) The time and method by which the prisoner or his advisor may obtain access to the prisoner's file and other information to be utilized at his hearing.

(c) Prior to the hearing, the prisoner and his advisor should be permitted to read the contents of the prisoner's file and all other written information to be utilized by the authority in reaching its decision.

(d) The hearings should be informal in nature. The prisoner should be entitled to be represented by an advisor of his choice, including legal counsel and he or his advisor should be entitled to comment on information available to the releasing authority, to present additional information either orally or in writing, and to question or cross-examine witnesses giving oral testimony. Upon a showing that a third person's oral testimony would be subject to disclosure if in written form, and is (1) relevant to the decision or to a contested issue of fact, and (2) (a) could not effectively be presented in written form, or (b) should be subjected to cross examination, the authority

[Footnote continued on page 43]

As the discussion below demonstrates, all these rights are already required in the federal system. *See* 18 U.S.C. §§ 4201-4218; 28 C.F.R. § 2.01 *et seq.* In the past, the Court has scrutinized federal practice to provide guidance on questions of minimum standards for fair, effective, and manageable decisionmaking in the correctional process. *See Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 786-89; *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 488-89; *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 567-68. The experience of *amici* reflects that the federal model reasonably accommodates the interests of prisoners in fair and accurate

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[38] [Continued]

should secure such testimony by subpoena or otherwise at public expense.

(e) When the prisoner has had an opportunity at a sentencing hearing to contest facts relevant to determining the length of sentence, the release authority may accept the facts as determined at that hearing without considering additional testimony or evidence.

9.3 Setting the Date of Release

(a) Within 15 days of the hearing, the releasing authority should set the prisoner's release date. The release date should be that established by the guidelines unless:

(i) the case presents a factor relevant to a principle of sentencing which is not taken into account in the guidelines;

(ii) application of the guidelines would result in substantial injustice to the person or the public;

(iii) application of the guidelines would be inconsistent with the sentence imposed by the court.

(b) Unless the release date is that established by the guidelines the authority should write and deliver to the prisoner a fully reasoned opinion explaining in specific detail why the guidelines were not followed in his case. With the name and other personally identifiable parts deleted, these opinions should be distributed to prisoners generally and open to public inspection. The opinions should serve as precedents for future decisions and as material for periodic review and revision of the guidelines."

American Bar Association, Standards Relating to the Legal Status of Prisoners §§ 9.2, 9.3 (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 597-98, 601 (1977).

parole decisions and the administrative needs of paroling authorities for efficient and expeditious procedures for large-scale decisionmaking. Project, *supra*, 84 Yale L.J. at 861-66.

1. *The Right to an Effective Hearing*

a. *Advance Notice of the Time of the Hearing and the Criteria To Be Applied*

This Court has recognized that advance written notice of potentially adverse government action occupies a cardinal position in fair process.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, 436 U.S. at 13, *quoting Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

Parole release decisions should be based on criteria which are announced in advance, and which relate to the various purposes which parole serves within the state's sentencing and correctional process. Nothing could be more characteristic of the arbitrariness forbidden by the Due Process Clause than the failure of an official decision to relate to legitimate public purposes. Since a parole authority is expected to perform several potentially conflicting functions, it has a responsibility to articulate how it has reconciled them in a given case. When criteria are clear, the prisoner and his representative are able to make a more effective and useful presentation. The decisions become fairer, because they are more rational, more consistent and more intelligent.

The federal parole statute responds to this requirement by providing for notification of the time and place

of the hearing at least 30 days in advance, 18 U.S.C. § 4208(b), and a description of the standards to be considered, 18 U.S.C. § 4206(a); 28 C.F.R. § 2.20. Only by giving prisoners sufficient time to gather the necessary information and to demonstrate that they can satisfy the established criteria can the board perform effectively. The right to an in-person hearing becomes a hollow ritual if the prisoner does not have sufficient opportunity to prepare. Contacting individuals in advance of the determination, and either obtaining supporting letters from them or arranging for their appearance at a parole board hearing requires substantial thought, time, and effort. Where, as in Nebraska, the Board of Parole is required to consider this information, it must provide reasonable opportunity for the inmate to generate these data. Adequate advance written notice of the date, time, and place of a parole board hearing is thus an integral component of fair and rational consideration.[39]

Similarly, notice of the criteria applied by paroling authorities is essential to enable the inmate both to understand the process and to prepare for the parole hearing. Under Nebraska law, much of an inmate's life comes under scrutiny when the Parole Board considers release.

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[39] In this case, the Eighth Circuit concluded that

> "[u]nder normal circumstances we believe that a minimum advance notice of 72 hours . . . allows the prisoner a fair opportunity to prepare for his appearance before the Board." *Greenholtz*, 576 F.2d at 1283.

We respectfully disagree. As described above, the information which the Nebraska Board must review involves facets of prisoners' past records, current behavior in prison, and future prospects. Prisoners must be given notice sufficiently in advance of the actual hearing to contact family, prospective employers, former attorneys—all outside the prison. Seventy-two hours advance notice simply does not provide the opportunity for adequate preparation of the needed data and is thus constitutionally inadequate. *See Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, 436 U.S. at 14; *Mullane* v. *Central Hanover Bank and Trust Co.*, *supra*, 339 U.S. at 314.

See NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). For the Board to reach a decision premised upon accurate information, the inmate must be given the opportunity to submit information in support of the parole application and to prepare rebuttal to damaging or incorrect material in the file. Only if an inmate knows, in advance, of the criteria to be considered can his presentation to the Board be relevant to the parole granting decision.

Advance notice of criteria also increases efficiency by allowing inmates to make a presentation focusing on pertinent issues. The parole board can proceed to do its work effectively and efficiently. Demystifying the parole process better enables the prisoner to provide useful material in an orderly manner.[40]

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, supra,* 436 U.S. at 14, *citing Wolff* v. *McDonnell, supra,* 418 U.S. at 564; *Morrissey* v. *Brewer, supra; In re Gault,* 387 U.S. 1 (1967); *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951). Just as the notice in *Memphis Light,* which did not advise customers of the availability of procedures for protesting termination of services, was found to be constitutionally infirm, so notice of parole hearings, which do not inform inmates of the issues to be considered, does not pass constitutional muster. Inmates in Nebraska have been "deprived of the notice which [is] their due." *Memphis Light, supra,* 436

[40] It is particularly ironic that Nebraska's Board does not give notice of its criteria because the Nebraska Legislature has substantially organized the parole decision process and has directed its Board to consider several specific factors about inmates. The Board is required to base its decisions on the fourteen statutory criteria. NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). There is simply no reason why inmates should not be informed of these factors in advance of the hearing.

U.S. at 15 (footnote omitted). The federal provisions, however, comport with due process in this regard.

b. *Personal Appearance at the Hearing*

While "the ordinary principle, established by [this Court's] decisions, [is] that something less than an evidentiary hearing is sufficient," *Dixon* v. *Love, supra,* 431 U.S. at 113, *quoting Mathews, supra,* 424 U.S. at 343, an opportunity to appear in person, even without witnesses, is critical in the parole process. Evaluation of the prospective parolee's attitude and demeanor can be crucial, and simple reliance on prison reports would leave too great a part of the decision in hands other than the parole board's. Experience teaches that the fairest decisions are reached in a setting where the prisoner can respond to the examiner's concerns and can show his readiness for release.

The federal system protects this interest by allowing the prisoner to appear and testify in his own behalf. *See* 18 U.S.C. § 4208(a); 28 C.F.R. § 2.12. Where, as in Nebraska and most other states, the board must consider factors relating to the prisoner's personality and attitude, such an in-person hearing is essential to due process.

The board cannot know a prisoner's "personality" by reading a file. The board cannot assess a parole plan and determine the propriety of a prisoner's chosen residence or employment without talking with the inmate, learning of the reasons for the choice, and finding answers to its questions. The board cannot assess the reasonableness of an inmate's participation in, or lack of involvement with, prison programs without asking him. Obtaining accurate and complete answers to all of these and other questions is essential for the board to obey its statutory mandate. However, the board cannot effectively check the accuracy of material in its files without verification by the inmate.

Accurate data is thus essential to a fair—and a constitutionally sufficient—appraisal.

The principle that an in-person hearing is needed for fair adjudication is deeply rooted in the American judicial process. "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908), quoted with approval in *Memphis Light*, 436 U.S. at 16, n.17. This Court has repeatedly held that an in-person hearing is constitutionally required. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted with approval in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).[41]

[41] Nebraska statutes provide for two types of hearings. The first are "parole review" hearings in which the board, after a review of the file, meets with each inmate for a few minutes. At these "parole review" hearings, inmates are not allowed to present evidence or call witnesses on their behalf. NEB. REV. STAT. § 83-192(9); *Greenholtz, supra*, at 1277. Review hearings are required yearly, whether or not the inmate is to be fully considered for parole. *Greenholtz, supra*, at 1277. The other type of hearing in Nebraska is the "formal" hearing, in which the inmate may appear, may offer evidence in support of parole, and may be represented by retained counsel.

The Eighth Circuit ruled that these formal hearings were constitutionally required when the inmate is first considered for parole. *Greenholtz, supra*, at 1283. This rule is necessary to comply with minimal standards of due process, for whenever an inmate is considered for parole release, factual questions must be resolved. Where facts may be in dispute, inadequate, or inaccurate, record review has been found insufficient to determine the outcome. *Wolff* v. *McDonnell, supra* (prison discipline); *Morrissey* v. *Brewer, supra* (parole revocation); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (prior hearing required when social insurance payments in issue). *Compare Dixon* v. *Love, supra*, 431 U.S. at 114 (1977) (factual basis

[Footnote continued on page 49]

c. *The Assistance of a Representative*

This Court has recognized that prisoners, as a group, have a greater difficulty in communicating effectively than many others in society. *Wolff* v. *McDonnell, supra*, 418 U.S. at 570; *Johnson* v. *Avery*, 393 U.S. 483, 487 (1969). For this reason, and because the time available to make an informed parole decision is so short, an inmate's chosen representative can be an effective aid to all concerned. *See Project, supra*, 84 Yale L.J. at 832 n.103, 839-41, 862-63 (average time devoted to federal parole decision is less than one-half hour). Moreover, representatives experienced in the parole process and familiar with the statutory criteria for release can prepare inmates to bring the needed information to the attention of the board and to limit excursions into irrelevancies. Furthermore, they can make a more cogent and coherent presentation than an apprehensive inmate.

The federal parole system again provides a model. An inmate may be assisted by a representative, who may be a relative, friend, prison staff member, lawyer or law student, prior to and during the hearing. Although the role of the representative is to some degree limited, representation is nevertheless available. 18 U.S.C. § 4208(d); 28 C.F.R. §2.12(b).

This Court has previously recognized the crucial role representation plays in fair process. In *Gagnon* v.

[41] [Continued]

in driver suspension determination undisputed; in-person hearing not required since the only question at such a proceeding would be whether an administrator would "show leniency and depart from his own regulations").

The administrative burden imposed by rules requiring parole hearings for all eligible inmates in Nebraska is minimal. The Board already holds "review" hearings in all cases and "formal" hearings in many cases. From July 1, 1975 until June 30, 1976, a total of 1,972 hearings were held, the majority of which were "review" hearings. *Greenholtz, supra*, at 1277. In-person considerations would require only the opportunity for a meaningful face-to-face meeting with the board at a time at which an inmate can present fully the issues for the decisionmakers.

Scarpelli, 411 U.S. 778, 783-91 (1973), the Court held that counsel would have to be provided by the state in probation revocation proceedings where there is a factual dispute as to whether the alleged violation was committed, or where there are complex justifying or mitigating reasons. Furthermore, the decision of whether counsel is required must be made in relation to whether the probationer "appears to be capable of speaking effectively for himself." *Id.* at 791; *see also Wolff* v. *McDonnell*, *supra*, 418 U.S. at 570.

Although the Solicitor General has suggested that special administrative problems would be caused by permitting representation and personal appearance by the inmate at a parole hearing, no known data support this assertion.[42] To the contrary, experience shows that permitting representation at hearings conducted within prisons does not pose any difficulties. The federal system permits representatives to attend the 10,000 parole hearings it conducts annually. When revocation hearings are held in federal institutions, counsel is permitted. *See* 28 C.F.R. § 2.50. In addition, the United States Bureau of Prisons has for years required federal institutions to permit representatives to assist inmates at prison disciplinary proceedings. *See* 28 C.F.R. § 541.15(b).

Where a parole system is complex, as is in Nebraska, and the outcome is either freedom or continued incarceration, there must be a strong showing of administrative inconvenience to overcome the inmate's need for representation. No such showing has been made in the record before this Court.

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[42] Nebraska reports no such incidents of violence or disruption, despite the fact that the inmate is allowed to appear before the board with counsel when formal hearings are granted. *See, e.g.*, Annual Report of the Nebraska Board of Parole, Seventh Annual Statistical Report, July 1, 1975 to June 30, 1976.

2. *The Right to a Decision Based on Accurate Information*

The parole board, if it is to make reasoned decisions, must be sure that those decisions are based on accurate and complete information. This Court has recognized that prior access to information relied on by decisionmakers is an important protection against this error. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 345-46; *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484.

To ensure that decisions are fair and based on accurate and complete records, the federal parole system allows the prisoner prior access to almost all of the documents on which the Parole Commission will rely. 18 U.S.C. § 4208(b); 28 C.F.R. § 2.55. The exceptions to disclosure track Rule 32(c) of the Federal Rules of Criminal Procedure concerning release of information to a defendant in a presentence investigation report. The Parole Commission withholds information where there is a potential of harm to the inmate or to others, or a need for confidentiality. A summary of the information in these documents must, however, be made available to the inmate. 18 U.S.C. § 4208(c).

Having reviewed these documents, the inmates are permitted to reply to them and to provide corrective or expanded information. Inmates may thus appear and testify on their own behalf. 18 U.S.C. § 4208(e); 28 C.F.R. § 2.13(a). Inmates may also submit letters, documents and other evidence for the record.

Parole hearings cannot be even minimally adequate unless inmates are allowed to present testimony relevant to the board's decision about parole.[43] Inmates must be

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[43] Apparently, Nebraska's statutes recognize, in part, that need and do permit inmates at the "formal" parole hearings to call witnesses. NEB. REV. STAT. § 83-195; *see also Greenholtz*, *supra*. Such routine practice demonstrates that calling witnesses is feasible and neither disrupts prison routine nor threatens institutional security.

allowed to present evidence "from a prospective employer about the type of work available, from a spouse about the home environment the prisoner can expect, and in the case of young offenders, parents' testimony about the guidance they can offer." *Franklin* v. *Shields*, *supra*, 569 F.2d at 796. Allowing the prisoner to participate fully in the hearing maximizes the quantity and the quality of the information considered by the board, increases the reliability of the decisionmaking process, and makes the process fairer in appearance as well as in fact.

We believe that the Court below erred by not requiring, absent exceptional circumstances, that inmates be permitted in formal hearings to call witnesses in their own behalf. In some situations, a meaningful presentation on a prisoner's behalf can be made only by a witness available for questioning by the parole board. Both factual and subjective judgments must be made by the parole authorities. Society must fashion its procedures to convey the necessary information to these decisionmakers.

A frequent response is that documents are an adequate substitute for live testimony. However, the Fourth Circuit recognized the unfairness of this approach last year when mandating that the Virginia Parole Board receive testimonial evidence because "some witnesses express themselves most effectively verbally." *Franklin* v. *Shields*, *supra*, 569 F.2d at 796. Given this fact, it is difficult to justify excluding oral testimony in light of society's critical need to be fully informed about the prospects for an applicant's rehabilitation if parole is granted. *Shields*, *supra*, at 796.

This Court's decision in *Wolff*, granting the right to call witnesses in prison disciplinary proceedings absent findings of institutional harm, compels the conclusion that prisoners should also be allowed to call witnesses in parole hearings absent express findings that permitting them to do so will be unduly hazardous to institutional safety.

Witnesses are even more important in parole hearings than in disciplinary proceedings. The interests of the prospective parolees are greater, as their liberty depends on the information furnished to the parole board. The interest of the state is similarly more important, as parole release affects all members of the community and must be based on thorough and accurate information. Moreover, in parole hearings, the testimony of witnesses will generally be less likely to cause institutional difficulties than in disciplinary proceedings. In most instances, witnesses in parole hearings will not be other inmates, and they will not testify about conditions or events within the institution. There is therefore much less probability of witnesses' creating risk of reprisal or undermining authority. *Cf. Wolff*, *supra*, 418 U.S. at 566. The justifications for providing witnesses are great, the corresponding burdens imposed minimal.[44]

3. *The Right to a Statement of Reasons For the Denial of Parole*

A statement of reasons serves many functions: to determine whether the decisions are based on appropriate criteria; to protect against arbitrary decisions; to promote care and thoughtfulness by decisionmakers; to foster rehabilitation by affording guidance for future conduct; to encourage development of a body of administrative precedent; and to educate sentencing judges about the

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[44] Since February of 1978, the United States Parole Commission has been required to provide most of the rights accorded under *Morrissey* to inmates subjected to parole rescission. *See Drayton* v. *McCall*, No. 78-2030 at 4905. (2d Cir. Oct. 2, 1978). Pursuant to that injunction, numerous rescission hearings have been held at which inmates are represented by counsel, present evidence on their own behalf and offer the testimony of witnesses. Insofar as attorneys for the *amici* are aware, not one report of institutional disruption or of threats to security has resulted. Instead, procedural fairness in the rescission decision has been assured without harm to other social values.

impact of parole decisions on their own judgments. *See United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d at 929-34. Those Courts of Appeals reaching this issue have uniformly agreed that the provision of reasons for an adverse decision is the most important due process protection. *See Franklin* v. *Shields, supra.*

In the federal system, both a personal conference to explain the reasons for denial and a written statement of reasons are required. 18 U.S.C. §§ 4208(g), 4206(b), (c); 28 C.F.R. § 2.13. The administrative burden imposed by this requirement is minimal. Many states, as well as the federal government, have given such statements for years in parole revocation and discipline cases. *See, e.g., Morrissey* v. *Brewer, supra; Wolff* v. *McDonnell, supra; United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra.* The survey of federal and state parole laws conducted by *amici* indicates that at least 45 states furnish an inmate some form of a written statement explaining the reasons for denial of parole. *See* Appendix B. And as Justice Marshall has stated:

> "it is not burdensome to give reasons when reasons exist. Whenever an application . . . is denied . . . there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action. . . ." *Board of Regents* v. *Roth, supra,* 408 U.S. at 591 (1971) (dissenting); *see also Mathews* v. *Eldridge, supra,* 424 U.S. at 345-56; *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943); *Mower* v. *Britton,* 504 F.2d 396 (10th Cir. 1974).

Furthermore, every court which has held that the Due Process Clause protects parole or similar decisionmaking has mandated that, when parole is denied, the decisionmaker must state the reasons for the denial as well as

the essential facts or evidence relied upon. *See, e.g., Franklin* v. *Shields, supra; United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (7th Cir. 1975); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra; Coralluzzo* v. *New York State Parole Board,* 566 F.2d 375 (2d Cir. 1977), *cert. dismissed as improvidently granted,* 435 U.S. 912 (1978); *Childs* v. *United States Board of Parole, supra; see also Zurak* v. *Regan,* 550 F.2d 86 (2d Cir. 1977); *Haymes* v. *Regan, supra;* and *Drayton* v. *McCall, supra.*

The attempt of the United States to equate the sentencing process with the parole process does not advance the analysis in this case. First, the fact that judges are not required to provide reasons when sentencing, see *Dorszynski* v. *United States,* 418 U.S. 424 (1974), has no bearing here. As the District of Columbia Circuit described:

> "[w]e think the part the judge has been accorded in sentencing is so different from the status of the Parole Board in the penological system as to call for a different approach to the due process issue, and that the ruling in *Dorszynski* is not to be taken as a constitutional precedent for rejecting the need, under the Due Process Clause, of a written statement of reasons for Board denial of parole. . . . For the Board to exercise its discretion fairly and knowledgeably within the purposes of the system, rational means—rational considerations—must attend its functioning." *Childs* v. *United States Board of Parole, supra,* 511 F.2d at 1283-84.

Second, the sentencing decision is not as informal as the United States suggests. *See* Brief for the United States at 40. The Federal Rules of Criminal Procedure mandate procedures to ensure a sentencing decision predicated upon accurate information. For example, the defendant has ample advance notice of the time of sentenc-

ing, access to the presentence report relied upon by the judge, the opportunity to correct mistakes in that report, a right to an in-person hearing at which he may speak and a right to an attorney to help prepare for the sentencing hearing and to speak on behalf of the defendant at the time of sentencing. In sum, the accused has the right to participate fully in the sentencing proceeding. *See* Rule 32 of the Federal Rules of Criminal Procedure. Furthermore, the entire sentencing hearing is recorded, so that a transcript is available for later reference. Moreover, if serious error exists in the information given to the judge, the sentence itself is invalid, and the defendant must be resentenced on the basis of accurate information. *See* Rule 35 of the Federal Rules of Criminal Procedure; 28 U.S.C. § 2255; *see also United States* v. *Tucker, supra.*

4. *The Right to an Adequate Record Of the Proceeding*

The Court below found that a tape recording of the proceeding was constitutionally adequate "provided that the recordings are of sufficient quality to enable the record to be reduced to writing." 576 F.2d at 1284. In the federal system, Congress has mandated that "[a] full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commissioner may retain of the proceeding." 18 U.S.C. § 4208(f). In practice, the Commission tape-records every hearing and furnishes copies of the tapes to inmates requesting them. *See* 28 C.F.R. § 2.55.

Providing a high-quality tape recording of a parole hearing satisfies minimum constitutional standards. When, as in the federal, Nebraska, and virtually all other state parole systems, the parole scheme depends upon analysis of prescribed facts and application of discrete criteria, an accurate record of the parole hearing is indispensable for

both inmates and paroling authorities. The inmates need accurate contemporaneous recordings to determine whether any misunderstandings or misapplications of parole criteria occurred. Paroling authorities need records to resolve factual disputes promptly and efficiently, to decide appeals when authorized, and to ensure that its staff conducts hearings fairly, competently, and uniformly. In short, the parole board must have the means to review its own performance.

CONCLUSION

For the reasons stated above, *amici* respectfully request that this Court recognize the liberty interest inherent in the parole release decision and grant inmates the procedural protections required by the Due Process Clause as outlined in this brief.

Respectfully submitted,

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Appendices

APPENDIX A

STATUTES INVOLVED

Parole Commission And Reorganization Act (Title 18, United States Code)

§ 4203. Powers and duties of the Commission

(a) The Commission shall meet at least quarterly, and by majority vote shall—

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter . . . .

* * * *

(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

(1) Grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole . . . .

* * * *

(c) The Commission, by majority vote, and pursuant to rules and regulations—

(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpoenas for witnesses or evidence

in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners . . . .

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

* * * *

(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole

to the authorities of any State otherwise entitled to his custody.

* * * *

§ 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrepect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or

any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

§ 4207. Information considered

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

§ 4208. Parole determination proceeding; time

(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole

determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to—

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(d) (1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

§ 4215. Reconsideration and appeal

(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon recipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the recipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.

Regulations of United States Parole Commission
(Title 28, Code of Federal Regulations)

§ 2.11 Application for parole.

(a) A federal prisoner (including a committed youth offender or prisoner sentenced under the Narcotic Addict Rehabilitation Act) desiring to apply for parole shall execute an application form as prescribed by the Commission. Such forms shall be available at each federal institution and shall be provided to prisoners eligible for parole. Prisoners committed under the Federal Juvenile Delinquency Act shall be considered for parole without application and may not waive parole consideration. A prisoner who receives an initial hearing need not apply for subsequent hearings.

(b) A prisoner may knowingly and intelligently waive any parole consideration on a form provided for that purpose. If a prisoner waives parole consideration, he may later apply for parole and may be heard during the next visit of the Commission to the institution at which he is confined, provided that he has applied at least 45 days prior to the first day of the month in which such visit of the Commission occurs.

(c) A prisoner who fails to submit either an application for parole or a waiver form shall be referred to the Commission's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(d) In addition to the above procedures relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisoners for completion by the prisoner.

§ 2.12 Hearing procedure.

(a) Whenever feasible, the initial parole determination hearing for an eligible prisoner shall be held at least 30 days prior to the expiration of his minimum sentence, or in the case of a prisoner with no minimum sentence within one-hundred and twenty days after his reception at a federal institution. The prisoner shall, at least 30 days prior to the hearing, be provided with written notice of the time and place of the hearing and of his right to review the documents to be considered by the Commission as provided by § 2.55. A prisoner may waive such notice, except that if such notice is not waived, the case shall be continued to the time of the next regularly scheduled proceeding of the Commission at the institution in which the prisoner is confined.

(b) A prisoner may be represented at a hearing by a person of his choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(c) No interviews with the Commission or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with

Commission procedures. Hearings shall not be open to the public.

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing examiners. The examiners shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct and, in addition, any other matter the panel may deem relevant. At the conclusion of the hearing, the panel shall orally inform the prisoner of its recommendation and, if such recommendation is for denial, of the reasons therefor.

(b) Written notice of the official decision, including the decision to refer under § 2.17 or § 2.24, shall be mailed or transmitted to the prisoner within 21 days of the date of the hearing, except in emergencies.

(c) If parole is denied, the prisoner shall also receive in writing the reasons therefor. In accordance with 18 U.S.C. 4206, reasons for parole denial may include the following, with further specification as appropriate.

(1) The prisoner has not substantially observed the rules of the institution or institutions in which confined;

(2) Release, in the opinion of the Commission, would depreciate the seriousness of the offense or promote disrespect for the law; or

(3) Release, in the opinion of the Commission, would jeopardize the public welfare.

In lieu of, or in combination with, the above reasons the prisoner shall be furnished with a guidelines evaluation statement containing his offense severity rating and salient factor score (including the points credited on each item of such score) as described in § 2.20, as well as the specific factors and information relied upon for any decision to continue such prisoner for a period outside the range indicated by the guidelines.

(d) A full and complete record of every hearing shall be retained by the Commission. Upon a request, pursuant to § 2.55, the Commission shall make available to any eligible prisoner such record as the Commission has retained of the hearing.

§ 2.14 Subsequent hearings.

(a) Subsequent hearings shall be conducted under the same procedure as initial hearings, except that the primary purpose of a subsequent hearing shall be to focus on any developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(b) During the month preceding a regularly scheduled institutional review hearing the case may be reviewed by an examiner panel on the record (including a current institutional progress report). If the recommendation is to grant parole, and the Regional Commissioner concurs, no hearing shall be conducted. However, cases in which the previous continuance has been limited by statute or Commission policy shall be placed directly on the docket for hearing.

§ 2.18 Granting of parole.

The granting of parole to an eligible prisoner rests in the discretion of the United States Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a

reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).

§ 2.19 Information considered.

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) Reports and recommendations which staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Presentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decisionmaking without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate. . . .

§ 2.22 Communication with the Commission.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Commission must submit a written request to the appropriate regional office setting forth the nature of the information to be discussed. Such personal interview may be conducted by Staff Personnel in the regional offices. Personal interviews, however, shall not be held by an examiner or member of the Commission except under the Commission's appeals procedures.

§ 2.25 Regional appeal.

(a) A prisoner or parolee may submit to the responsible Regional Commissioner a written appeal of a decision to grant, rescind, deny, or revoke, parole, except that any appeal of a Commission decision pursuant to § 2.17 shall be pursuant to § 2.27. This appeal must be filed on a form provided for that purpose within thirty days from the date of entry of such decision.

(b) The Regional Commissioner may affirm the decision, order a new institutional hearing on the next docket, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of a decision by more than one hundred eighty days whether based upon the record or following a regional appellate hearing shall require the concurrence of two out of three Regional Commissioners. Decisions requiring a second or additional vote shall be referred to other Regional Commissioners on a rotating basis as established by the Chairman.

(c) Regional appellate hearings may be held at the regional office before the Regional Commissioner. If a regional appellate hearing is ordered, attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Commissioner stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Commissioner shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(d) Within 30 days of receipt of the appeal, except in emergencies, the Regional Commissioner shall inform the applicant in writing of the decision and the reasons therefor.

(e) If no appeal is filed within thirty days of the date of the entry of the original decision, such shall stand as the final decision of the Commission.

(f) Appeals under this section may be based upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

§ 2.26 Appeal to National Appeals Board.

(a) Within 30 days of entry of a Regional Commissioner's decision under § 2.25, a prisoner or parolee may appeal to the National Appeals Board on a form provided for that purpose. However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appeals Board. The National Appeals Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The National Appeals Board shall act within 60 days of receipt of the appellant's papers, to affirm, modify, or reverse the decision.

(c) Decisions of the National Appeals Board shall be final.

§ 2.28 Reopening of cases.

Notwithstanding the appeal procedure of § 2.25 and § 2.26, the appropriate Regional Commissioner may, on his own motion, reopen a case at any time upon the receipt of new information of substantial significance and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Commissioner under the procedures of § 2.17.

§ 2.29 Release on parole.

(a) A grant of parole shall not be deemed to be effective until a certificate of parole has been delivered to the prisoner.

(b) Parole release dates generally will not be set more than six months from the date of the parole hearing. Residence in a Community Treatment Center as part of a parole release plan generally shall not exceed one hundred and twenty days. An effective date of parole shall not be set for a Saturday, Sunday, or a legal holiday.

(c) When an effective date of parole has been set by the Commission, release on that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for parole supervision. The appropriate Regional Commissioner may, on his own motion, reconsider any case prior to release and may reopen and advance or retard a parole date. A parole grant may be retarded for up to one hundred and twenty days without a hearing for development and approval of release plans.

§ 2.55 Disclosure of records.

(a) Prior to an initial parole hearing conducted pursuant to § 2.13 or any review hearing thereafter, a prisoner may review reports and other documents in the institution file which will be considered by the Commission at his parole hearing. These documents are generally limited to official reports bearing on the prisoner's offense behavior, personal history, and institutional progress. Review of such reports shall be permitted by the Bureau of Prisons pursuant to its regulations within seven days of a request by the prisoner, except that in the case of reports which must be sent to the originating agency for clearance pursuant to paragraph (c) of this section, a reasonable amount of time shall be permitted to obtain such clearance. Copies of reports and documents

may be furnished under applicable Bureau of Prisons regulations.

(b) A report shall not be disclosed to the extent it contains:

(1) Diagnostic opinions which, if known to the prisoner, could lead to a serious disruption of his institutional program;

(2) Material which would reveal sources of information obtained upon a promise of confidentiality; or

(3) Any other information which, if disclosed, might result in harm, physical or otherwise, to any person. The term "otherwise" shall be deemed to include the legitimate privacy interests of such person under the Privacy Act of 1974.

(c) It shall be the duty of the agency which originated any report or document referred to in paragraph (a) of this section to determine whether or not to apply any of the exceptions to disclosure set forth in paragraph (b) of this section. If any report or portion thereof is deemed by the originating agency to fall within an exception to disclosure, such agency shall prepare and furnish for inclusion in the institution file a summary of the basic contents of the material to be withheld, bearing in mind the need for confidentiality or impact on the prisoner, or both. In the case of a report prepared by an agency other than the Bureau of Prisons, the Bureau shall refer such report to the originating agency for a determination relative to disclosure, if the report has not been previously cleared or prepared for disclosure.

(d) Upon request by the prisoner, the Commission shall make available a copy of any record which it has retained of a parole or parole revocation hearing pursuant to 18 U.S.C. 4208(f).

(e) Except for deliberative memoranda referred to in paragraph (f) of this section, reports or documents received at regional offices which may be considered by the Commission at any proceeding shall be forwarded for inclusion in the prisoner's institutional file so that he may review them pursuant to paragraph (a) of this section. Such reports will first be referred by the Commission to originating agencies pursuant to paragraph (c) of this section for a determination relative to disclosure if the report has not previously been cleared or prepared for disclosure.

(f) Duplicate copies of records in a prisoner's institutional file as well as deliberative memoranda among Commission Members or staff which do not contain new factual information relative to the parole release determination are retained in Parole Commission regional office files following initial hearing. Records maintained in these files shall be made available to prisoners, parolees, mandatory releasees, their authorized representative and members of the public upon written request in accordance with applicable law and Department of Justice regulations at 28 CFR Part 16, Subparts C & D. The Commission reserves the right to invoke statutory exemptions to disclosure of its files in appropriate cases under the Freedom of Information Act or Privacy Act text provisions and Alternate Means of Access.

APPENDIX B

SURVEY OF FEDERAL AND STATE PAROLE LAWS*

	In-person Hearing	Right to Representative at Hearing	Advance Notice of Hearing Date	Statutory Criteria For Parole	Verbatim Recording of Hearing	Written Statement for Denial of Parole	Access to Files	Right to Reply
UNITED STATES	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ALABAMA	Yes	No		Yes	No	Yes		
ALASKA	Yes	Yes		Yes	No	Yes	Yes	
ARIZONA	Yes	Yes		Yes	No	Yes		
ARKANSAS	Yes	Yes		Yes	No	Yes	Yes	
CALIFORNIA	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
COLORADO	Yes	No		Yes	Yes	Yes		
CONNECTICUT	Yes	No		Yes	Yes	Yes		
DELAWARE	Yes	Yes	Yes	Yes	No	Yes		
FLORIDA	Yes	No	Yes	Yes	Yes	Yes		
GEORGIA	No			Yes	No	Yes		
HAWAII	Yes	Yes		Yes	Yes	Yes		
IDAHO	Yes	Yes		Yes	Yes	No		
ILLINOIS	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
INDIANA	Yes	No		Yes	**	No		
IOWA	Yes	No		Yes	No	Yes		

	In-person Hearing	Right to Representative at Hearing	Advance Notice of Hearing Date	Statutory Criteria For Parole	Verbatim Recording of Hearing	Written Statement for Denial of Parole	Access to Files	Right to Reply
KANSAS	Yes	Yes		Yes	No	No	Yes	
KENTUCKY	Yes	Yes		Yes	No	Yes		
LOUISIANA	Yes	Yes		Yes	No	Yes	Yes	
MAINE	Yes	Yes			No	Yes		
MARYLAND	Yes	No	Yes	Yes	Yes	Yes	Yes	
MASSACHUSETTS	Yes	No		Yes	No	Yes		
MICHIGAN	Yes	Yes		Yes	No	Yes		
MINNESOTA	Yes	Yes	Yes	Yes	Yes	Yes		
MISSISSIPPI	Yes	No	Yes	Yes	Yes	Yes		
MISSOURI	Yes	No		Yes	Yes	Yes		
MONTANA	Yes	Yes		Yes	No	Yes		
NEBRASKA	Yes	Yes		Yes	Yes	Yes		
NEVADA	Yes	No		Yes	No	No		
NEW HAMPSHIRE	Yes	Yes		Yes	Yes	Yes		
NEW JERSEY	Yes	Yes		Yes	No	Yes	Yes	Yes
NEW MEXICO	Yes	No		Yes	No	Yes	Yes	
NEW YORK	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
NORTH CAROLINA	Yes	Yes		Yes	No	Yes		
NORTH DAKOTA	Yes	Yes		Yes	Yes	Yes	Yes	
OHIO	Yes	No		Yes	No	Yes		
OKLAHOMA	Yes	Yes		Yes	No	No		
OREGON	Yes	No	Yes	Yes	Yes	Yes	Yes	
PENNSYLVANIA	Yes	Yes	Yes	Yes	No	Yes		
RHODE ISLAND	Yes	Yes		Yes	No	Yes		
SOUTH CAROLINA	Yes	Yes		Yes	Yes	Yes		
SOUTH DAKOTA	Yes	Yes		Yes	No	No	No	
TENNESSEE	Yes	Yes	Yes	Yes	No	Yes		
TEXAS	No	No		Yes	No	Yes		
UTAH	Yes	Yes	Yes	Yes	Yes	Yes		
VERMONT	Yes	Yes		Yes	Yes	Yes		
VIRGINIA	Yes	No		Yes	No	Yes	Yes	Yes
WASHINGTON	Yes	No			No	Yes		
WEST VIRGINIA	Yes	No	Yes	Yes	Yes	Yes	No	
WISCONSIN	Yes			Yes	Yes	Yes		
WYOMING	Yes	Yes			Yes	Yes		
Total: Yes	49	29	14	48	23	45	14	6
No	2	20	0	0	27	6	2	0
Silent	0	2	37	3	1	0	35	45

Source: State statutes cited in Appendix C; V. O'Leary & K. Hanrahan, *Parole Systems in the United States* (3d ed. 1976).

Notes: * A blank space indicates that the pertinent state statute has no express provision concerning this procedural protection. In practice, it is believed that several of these procedures are afforded in a number of states.

** Although the statute is silent on this question, the O'Leary and Hanrahan study indicates that a verbatim recording is available at least to female prisoners.

APPENDIX C

OFFICIAL CITATIONS TO FEDERAL AND STATE PAROLE LAWS

UNITED STATES	18 U.S.C. § 4201 *et seq*; 28 C.F.R. § 2.01 *et seq*. (1977).
ALABAMA	ALA. CODE tit. 42, § 7 (Cum. Supp. 1973), ALA CODE tit. 42, § 8 (1959).
ALASKA	ALASKA STAT. §§ 33.15.080, 33.15.140 (1978).
ARIZONA	ARIZ. REV. STAT. §§ 31-411, 31-412 (Cum. Supp. 1978-1979).
ARKANSAS	ARK. STAT. ANN. §§ 43-2804, 43-2808, 43-2819, 43-2829 (1977).
CALIFORNIA	CAL. PENAL CODE §§ 3041, 3041.5, 3042 (West 1970, Cum. Supp. 1977, Cum. Supp. 1978).
COLORADO	COLO. REV. STAT. § 17-1-201 (Cum. Supp. 1976)[1].
CONNECTICUT	CONN. GEN. STAT. ANN. § 54-125 (West Cum. Supp. 1978)[2].
DELAWARE	DEL. CODE tit. 11, §§ 4346, 4353 (1975), DEL. CODE tit. 11, §§ 4347, 4350 (Cum. Supp. 1977).
FLORIDA	FLA. STAT. ANN. §§ 947.135, 947.16, 947.17, 947.18 (West 1973, Cum. Supp. 1978).
GEORGIA	GA. CODE ANN. § 77-514, 77-516 (1973).
HAWAII	HAW. REV. STAT. § 353-67, 353-69 (1976).
IDAHO	IDAHO CODE § 20-223 (Cum. Supp. 1978).
ILLINOIS	ILL. ANN. STAT. ch. 38, §§ 1003-3-4, 1003-3-5 (Smith-Hurd Cum. Supp. 1978).
INDIANA	IND. CODE ANN. § 11-1-1-9 (Burns Cum. Supp. 1978).

IOWA	IOWA CODE ANN. §§ 906.4, 906.5, 906.7 (West Spec. Pamphlet 1978).
KANSAS	K.S.A. § 22-3711 (1974), K.S.A. § 22-3717 (Cum. Supp. 1977).
KENTUCKY	KY. REV. STAT. § 439.340 (Cum. Supp. 1978).
LOUISIANA	LA. REV. STAT. ANN. §§ 15:574.3, 15:574.4 (West Cum. Supp. 1978).
MAINE	ME. REV. STAT. tit. 34, § 1553 (1978).
MARYLAND	MD. ANN. CODE art. 41, §§ 111, 112, 114 (1978).
MASSACHUSETTS	MASS. GEN. LAWS. ANN. ch. 127, §§ 130, 134, 136 (West 1972).
MICHIGAN	MICH. STAT. ANN. §§ 28.2303, 28.2305 (1978).
MINNESOTA	MINN. STAT. ANN. § 243.05 (West Cum. Supp. 1978)[3].
MISSISSIPPI	MISS. CODE ANN. § 47-7-17 (Cum. Supp. 1978).
MISSOURI	MO. ANN. STAT. § 549.261 (Vernon Cum. Supp. 1978).
MONTANA	MONT. REV. CODES ANN. §§ 94-9832, 94-9835 (1969).
NEBRASKA	NEB. REV. STAT. § 83-192 (1976).
NEVADA	NEV. REV. STAT. § 213.1099 (1977).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 651:45 (1974).
NEW JERSEY	N.J. STAT. ANN. §§ 30:4-123.19, 30:4-123.25 (West 1974).
NEW MEXICO	N.M. STAT. ANN. §§ 41-17-18, 41-17-24, 41-17-27 (1972).
NEW YORK	N.Y. EXEC. LAW § 259(i) (McKinney Supp. Pamphlet 1978).

NORTH CAROLINA	N.C. GEN. STAT. § 148-57.1 (1978).
NORTH DAKOTA	N.D. CENT. CODE §§ 12-59-04, 12-59-05 (1976).
OHIO	OHIO REV. CODE ANN. § 2967.03 (Page 1975).
OKLAHOMA	OKLA. STAT. ANN. tit. 57, §§ 332.8, 354 (West 1969), OKLA. STAT. ANN. tit. 57 ch. 7 app. § 332 (West Cum. Supp. 1978-1979).
OREGON	OR. REV. STAT. § 144.125 (1977).
PENNSYLVANIA	PA. STAT. ANN. tit. 61 §§ 331.21, 331-22 (Purdon 1964, Cum. Supp. 1978-1979)[4].
RHODE ISLAND	R.I. GEN LAWS §§ 13-8-14, 13-8-24 (Cum. Supp. 1977)[5].
SOUTH CAROLINA	S.C. CODE §§ 24-21-50, 24-21-640 (1977).
SOUTH DAKOTA	S.D. COMPILED LAWS ANN. §§ 23-60-2, 23-60-12 (1969).
TENNESSEE	TENN. CODE ANN. § 40-3614 (Cum. Supp. 1978).
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15. (Vernon Supp. Pamphlet 1978).
UTAH	UTAH CODE ANN. §§ 77-62-3, 77-62-13, 77-62-14 (1953).
VERMONT	VT. STAT. ANN. tit. 28, §§ 501, 502 (Cum. Supp. 1978).
VIRGINIA	VA. CODE § 53-251 (1978)[6].
WASHINGTON	WASH. REV. CODE ANN. § 9.95.110 (1977).
WEST VIRGINIA	W.VA. CODE § 62-12-13 (1977)[7].
WISCONSIN	WIS. STAT. ANN. § 57.06 (West Cum. Supp. 1978-1979)[8].
WYOMING	WYO. STAT. § 7-13-402 (1977).

Notes:

[1] *Johnson* v. *Heggie*, 362 F.Supp. 851 (D. Colo. 1973).

[2] *Dumschat* v. *Board of Pardons, State of Conn.*, 432 F. Supp. 1310 (D.C. 1977).

[3] *State* v. *Schoen*, No. 218 (Minn. Sup. Ct. Sept. 22, 1978).

[4] *Bunner* v. *Comm'r., Bd. of Probation and Parole*, 379 A.2d 1368 (Pa. Commw. Ct. 1977).

[5] *State* v. *Ouimette*, 367 A.2d 704 (R.I. 1976).

[6] *Franklin* v. *Shields*, 399 F.Supp. 309 (W.D.Va.), *aff'd in part, rev'd in part*, 569 F.2d 784 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1003 (1978).

[7] *Sites* v. *McKenzie*, 423 F.Supp. 1190 (N.D. W.Va. 1976).

[8] *Tyznik* v. *Dept. of Health and Social Services*, 238 N.W.2d 66, 71 Wis.2d 169 (1976).